

DOCKET FILE COPY ORIGINAL

ORIGINAL

LAW OFFICES

FISHER, WAYLAND, COOPER AND LEADER

1255 TWENTY-THIRD STREET, N.W.

SUITE 800

WASHINGTON, D. C. 20037-1170

TELEPHONE (202) 659-3494

TELECOPIER (202) 296-6518

WRITER'S DIRECT NUMBER

(202) 775-3547

January 11, 1994

BEN S. FISHER
(1890-1954)

CHARLES V. WAYLAND
(1910-1980)

OF COUNSEL
JOHN O. HEARNE

RECEIVED

JAN 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEN C. FISHER
GROVER C. COOPER
MARTIN R. LEADER
RICHARD R. ZARAGOZA
CLIFFORD M. HARRINGTON
JOEL R. KASWELL
KATHRYN R. SCHMELTZER
DOUGLAS WOLOSHIN
DAVID D. OXENFORD
BARRY H. GOTTFRIED
ANN K. FORD
BRUCE D. JACOBS
ELIOT J. GREENWALD
CARROLL JOHN YUNG
JOHN JOSEPH MCVEIGH
BARRIE D. BERMAN
BRUCE F. HOFFMEISTER
SCOTT R. FLICK
FRANCISCO R. MONTERO
GREGORY L. MASTERS*
ROBERT C. FISHER
LAUREN ANN LYNCH
GLENN S. RICHARDS
JOHN M. BURGETT*
SHARON L. TASMAN*
THERESA A. SMYTH
JULIE ARTHUR GARCIA*
LAUREN SCHAEFER DRAKE*
HOWARD C. GRIBOFF*

*NOT ADMITTED IN D.C.

DOCKET FILE COPY ORIGINAL

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-221
RM-8265
In the Matter of Amendment of
Section 73.202(b) Table of Allotments
FM Broadcast Stations
(East Wenatchee, Ephrata and Chelan
Washington)

Dear Mr. Caton:

On behalf of KSEM, Inc., a party in the above-referenced rule making proceeding, attached is a copy of a Reply to Opposition to Petition to Dismiss or Deny that KSEM has filed against the application of TRMR, Inc. for a new FM station on Channel 230A at Ephrata, Washington. Since TRMR's application for Ephrata conflicts with the petition for rulemaking filed by Hartline Broadcasters (whose principals are the same as TRMR's), the Reply to Opposition to Petition to Dismiss or Deny the Ephrata application should be considered in conjunction with the

No. of Copies rec'd
List ABCDE

042

above-referenced rulemaking proceeding.

Very truly yours,


Kathryn R. Schmeltzer

KRS:srb
attach.
4745-000.L5

cc w/attach: Michael C. Ruger, Esq.
John F. Garziglia, Esq.
Melodie Virtue, Esq.
Mr. Brian J. Lord

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

RECEIPT COPY

In re Application of)

TRMR, Inc.)

For a Construction Permit)
for a New FM Broadcast Station)
on Channel 230C2 at)
Ephrata, Washington)

FCC File No. BPH-930721MC

RECEIVED

JAN - 5 1994

To: The Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY TO OPPOSITION
TO PETITION TO DISMISS OR DENY**

KSEM, Inc., the licensee of Station KDRM(FM), Channel 257A, Moses Lake, Washington (hereinafter "KSEM"), by its attorneys, hereby submits its Reply to the "Opposition to Petition to Dismiss or Deny" filed by TRMR, Inc. on December 22, 1993 in the above-referenced proceeding.

1. KSEM's Petition to Dismiss or Deny demonstrated that there is an irreconcilable conflict between TRMR's pending application for Channel 230C2 at Ephrata, Washington and a petition for rule making filed by the principals of TRMR under the name Hartline Broadcasters which proposes the deletion of Channel 230C2 at Ephrata in order to allot Channel 229C2 East Wenatchee, Washington. The petition showed that TRMR's Channel 230C2 application for Ephrata was filed solely as a "place-saving" measure in order to preclude counterproposals in the East Wenatchee rule making proceeding. Significantly, TRMR's Opposition does not deny that the Channel 230C2 application was

filed as a "place-saving" measure. Moreover, the arguments advanced in the Opposition are not supported by either logic or the facts and the case precedent filed upon by TRMR is readily distinguishable. TRMR/Hartline is engaged in a clear and unmitigated abuse of the Commission's processes which is wholly contrary to the orderly administration of the Commission's processes. Its application for Channel 230C2 should be promptly dismissed or denied or alternatively set for an evidentiary hearing on the issues requested in KSEM's Petition to Dismiss or Deny.

I. TRMR/Hartline Has Failed To Present Any Credible Reason for Filing An Application Which Conflicts With Its Pending Rule Making Proposal

2. In its Opposition, TRMR strives to present some kind of rationale for filing its Ephrata application for Channel 230C2 in July 1993 when it had a pending rule making proposing the deletion of that very channel. TRMR's arguments are neither consistent nor convincing.

3. First, TRMR claims that it and its principals "have long had an interest in constructing an FM station in Ephrata." (Oppos., p. 2). The facts are, however, that TRMR's principal, Tom Read,^{1/} previously had an FM station in Ephrata, the channel occupied by KULE-FM. The station was licensed to Read Broadcasting. Read sold the FM station to B & G Enterprises on September 28, 1990, and B & G Enterprises sold the station to

^{1/} Tom Read is the 55% shareholder, officer and director of TRMR, Inc. His wife Melinda Boucher Read owns the remaining 45%.

Basin Street Broadcasting on September 3, 1991. Prior to selling the FM station, TRMR had obtained the upgrade to Channel 222C2.^{2/} After selling the facility, TRMR -- in an amazing display ofchutzpah -- filed an application for a new facility on Channel 222C2 at Ephrata on July 28, 1992 (FCC File No. BPH-920728MC). That application was returned on February 25, 1993 because Channel 222C2 was not open for applications -- something TRMR certainly knew, for its principals themselves had obtained the upgrade channel and failed for two years thereafter to implement it. The argument in TRMR's Opposition that it long had an interest in constructing an FM station in Ephrata" and that Channel 222C2 "had lain fallow for over four years" is disingenuous at best. TRMR had an FM station in Ephrata and, after obtaining the upgrade to Channel 222C2, then sold the station.

4. Next, TRMR advances arguments which are not logical. TRMR contends that once it determined that the Commission was not going to accept its July 1992 application for Channel 222C2 at Ephrata, it decided to seek the allotment of Channel 229C2 at East Wenatchee. TRMR proposed in its rule making petition that the upgrade Channel 222C2 at Ephrata be deleted and substituted for open Channel 230C2. Then Basin Street Broadcasting, the licensee of KULE-FM, filed an application to upgrade to Channel

^{2/} The upgrade was granted in MM Docket No. 87-326, adopted November 30, 1988 and effective February 13, 1989. On June 16, 1989, Read Broadcasting filed an application to change from Channel 240A to Channel 222C2 (FCC File No. BPH-890616ID) but that application requested a waiver of the short-spacing rule which the Commission found violative of 47 C.F.R. §73.207. The application was dismissed as unacceptable for filing.

222C2, a move that TRMR certainly should have anticipated. However, Channel 230C2 at Ephrata was open for applications. The Opposition contends that TRMR did not file an application during the window filing period for Channel 230C2 at Ephrata "since it believed that other applications would be filed" but it then decided to file for Channel 230C2 as a "first-come first-serve allotment" and "additionally made a decision to continue to pursue the rule making proposal filed by its principals as Hartline Broadcasters seeking the allotment of a channel to East Wenatchee, Washington" (Oppos., p. 4). Although TRMR purports to have an intention to construct a facility at Ephrata, it simultaneously purports to have an intention to build a facility in East Wenatchee which is mutually exclusive with the Ephrata channel.

5. TRMR's arguments simply cannot be credited for a number of reasons. First, if TRMR wanted an FM station at Ephrata it could have kept its FM station and upgraded the facility on Channel 222C2. Second, TRMR could have filed an application for Channel 230C2 during the window filing period. TRMR's explanation that it did not file for Channel 230C2 during the window filing period because it feared competing applications is no excuse -- the prospect of competitors has never stopped hundreds of other genuinely sincere applicants for new channels. Indeed, if Channel 229C2 is allotted to East Wenatchee, TRMR would also face competing applications. Third, by the time TRMR filed for Channel 230C2 on July 21, 1993 its principals had already filed the petition for rule making to allot Channel 229C2 to East Wenatchee which proposed the deletion of Channel 230C2 at

Ephrata. TRMR/Hartline has not presented any reason why the Commission should permit an applicant to apply for a channel that that applicant has proposed to delete. Indeed, TRMR has not reconciled this matter at all. Fourth, the lack of good faith demonstrated by TRMR/Hartline is evident from the fact that it used separate names in connection with its application and its rulemaking proposal and did not disclose the interrelationships until it knew its identity was about to be unmasked. Fifth, TRMR did not reveal in the rule making proceeding until the filing of comments that it really intends to amend its Ephrata application to specify East Wenatchee as the community of license. This expressed intent conflicts with TRMR's professed intent to construct a facility at Ephrata. Finally, TRMR has the temerity to proclaim in its Opposition that "there is no violation of the Commission's rules created by the proponent of a rule making proposal filing an application that may somehow be inconsistent with the underlying rule making proposal." (Oppos., p. 7). However, the Commission has stated as follows:

. . . [W]e caution prospective petitioners against filing petitions for rule making in the absence of a genuine interest in pursuing the allotment request. In the event a pattern of such activity is found, the Commission could initiate an inquiry to determine whether an abuse of our processes has occurred or disregard the petitioner's expression of interest.

(See Amendment of Section 73.202(b), Bagdad, Arizona, DA 93-1478 (Acting Chief, Allocations Branch, released December 28, 1993, n. 2 and cases cited therein). The Commission has similarly emphasized that the filing of non-bona fide 301 applications is an abuse of process.

II. The Case Precedent Cited By TRMR, Inc.
Fails To Support Its Arguments

6. TRMR points to several cases in support of its arguments but none of these cases helps TRMR in the least. According to TRMR, its situation is similar to that of a petitioner in a rule making who files both the original petition and then a counterproposal to that petition. It cites Canovanas et al., Puerto Rico, 7 FCC Rcd 3324 (Acting Chief, Allocations Branch 1992); Lady's Island and Ridgeland, South Carolina, 6 FCC Rcd 7253 (1991) and Fairmont, North Carolina et al., 6 FCC Rcd 4285 (1991). The circumstances in those cases are very different. Those cases stand for the proposition that a petitioner in a rulemaking proceeding may submit, as a counterproposal, a new proposal which is mutually exclusive with the original proposal. In such a situation other parties have a safeguard because the Commission's general practice is to issue a Public Notice announcing the filing of counterproposals and setting forth a period for responses. These cases do not stand for the proposition that an entity may file an application for the very channel it proposes to delete in the rule making proceeding. Indeed, the tactics employed by TRMR/Hartline eliminate the responses from other parties which the cases cited by TRMR seek to preserve. Moreover, in Canovanas, supra, the Commission stressed that that "[e]ven though Colon-Ventura has filed a counterproposal changing its proposed community of license, the effect on [licensees whose stations would be modified by the counterproposal] are unchanged." 7 FCC Rcd at 3327.

7. Lady's Island, supra, is also inapposite. In that case, the petitioner originally requested the substitution of a Class C3 channel for a Class A channel at Ridgeland, South Carolina and the reallocation of the channel to Lady's Island, South Carolina. In the Notice of Proposed Rule Making, the Commission requested further information as to whether Lady's Island was a community for allotment purposes and questioned whether the reallocation to Lady's Island would deprive Ridgeland of its sole local aural broadcast transmission service. At that juncture the petitioner filed comments counterproposing the allotment of the Class C3 Channel to Ridgeland. The Report and Order emphasized that the proceeding was uncontested and that public notice of the counterproposal had been given.^{3/}

8. TRMR also appears to rely heavily on a staff Memorandum Opinion and Order in Keokuk, Iowa, 4 FCC Rcd 7467 (Chief, Policy and Rules Division, 1989). But that case also is readily distinguishable. It did not involve an application which conflicted with a rulemaking proposal; it did not involve changing a city of license; and it was not a contested proceeding.

9. The fact is that TRMR still wants to have its cake and eat it too even though Commission policy and case precedent flatly contradict its arguments. As KSEM has already demonstrated, TRMR cannot amend its Ephrata application to change its community of license. It is not eligible to seek a change in community of license. See Amendment of Table of Allotments (Santa Margarita and Guadalupe, California), 4 FCC Rcd 7887

^{3/} The Fairmont case cited by TRMR is also inapposite.

(1989), which held that the benefits of adjacent channel upgrade proceedings do not apply to applicants. See also Amendment of Section 73.202(b), Table of Allotments (Caldwell, Texas), 6 FCC Rcd 2050 (1991). Clearly, TRMR/Hartline is abusing the Commission's processes and it should not benefit from such shenanigans.

Accordingly, for the reasons set forth above, TRMR's application for a new FM station at Ephrata, Washington is not a bona fide application and it must be dismissed or denied. It was filed solely to protect Hartline's petition to allot a channel to East Wenatchee and to preclude counterproposals. The patent conflict between TRMR's Ephrata application and Hartline's petition for rulemaking constitutes an egregious abuse of the Commission's processes and disservices the public interest. Alternatively, the application must be set for hearing on the issues requested by KSEM.

Respectfully submitted,

TRMR, Inc

By: 

Richard R. Zaragoza
Kathryn R. Schmeltzer
Gregory L. Masters

Its Attorneys

FISHER, WAYLAND, COOPER
and LEADER
1255 23rd St., N.W.
Suite 800
Washington, D.C. 20037
(202) 659-3494

Dated: January 5, 1993

4745-000.P

CERTIFICATE OF SERVICE

I, SYBIL R. BRIGGS, do hereby certify that I have this 5th day of January, 1994, mailed by first class United States mail, postage prepaid, copies of the foregoing "REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY" to the following:

*Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

*Larry D. Eads
Chief Audio Services Division
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, D.C. 20554

*Dennis Williams
Chief, FM Branch
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

*Edwin Jorgensen, Esq.
Assistant Chief, Legal
FM Branch
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

John Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
Counsel for TRMR, Inc.
and Hartline Broadcasters


Sybil R. Briggs

*By Hand Delivery